No. 76-1262

In the Supreme Court of the United States

OCTOBER TERM, 1976

HERBERT M. GANNET, PETITIONER

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1262

HERBERT M. GANNET, PETITIONER

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner Herbert M. Gannet is an attorney practicing in New Jersey. In November 1974, the Internal Revenue Service received a letter from Herbert Zuckerman, an attorney, transmitting a cashier's check in the amount of $142,497.81. Zuckerman's letter explained that the check represented additional amounts due from a taxpayer for past years and that the name of the taxpayer had not been disclosed to Zuckerman (R. 41a).[1] In July 1975, the Internal Revenue Service served a summons on Zuckerman's bank in order to determine the source of the funds Zuckerman paid to the Internal Revenue Service. In response to the summons, the bank turned over a copy of a

---

[1]"R." and "Supp. R." respectively refer to the record appendix and the supplemental record appendix in the court of appeals.

$142,497.81 check, drawn on the trust account of petitioner, and payable to Zuckerman. This check was drawn on the First National State Bank (Supp. R. 2). On October 3, 1975, the Service served a summons on the First National State Bank seeking copies of all negotiable instruments and deposit slips relating to the source of the $142,497.81 payment from Gannet to Zuckerman. In response to the summons, the bank furnished the Service with copies of cashier's checks numbered 39649 and 39651 (totalling $142,497.81), which had been issued by the bank and then deposited in Gannet's trust account (Pet. App. 14a-15a).

The bank informed Gannet of its compliance with the summons. Gannet then gave the bank written notice not to provide the Internal Revenue Service with any further information concerning his trust account (Pet. App. 15a). On November 19, 1975, the Service issued a second summons to the bank seeking the identity of the purchaser of cashier's checks numbered 39649 and 39651 and all documentation relating to the source of the funds used to purchase the cashier's checks (Pet. App. 15a-16a). Gannet brought an action to enjoin the bank from complying with the summons. After the bank did not comply, the government brought this action to enforce the summons. The two cases were consolidated in the United States District Court for the District of New Jersey (Pet. App. 31a). The district court ordered the summons enforced (Pet App. 37a), and the court of appeals and Mr. Justice Brennan denied petitioner's requests for a stay pending appeal (Pet. 6). The district court thereafter turned over to the

government the documents sought by the summons.[2] The court of appeals affirmed (Pet. App. 1a-11a).[3]

1. The courts below correctly held that the attorney-client privilege did not bar the enforcement of the Internal Revenue Service summons against the First National State Bank of New Jersey. That privilege applies only to confidential communications between attorney and client and does not encompass communications by a third party unless he is acting merely as an agent in transmitting the communication from the client to the attorney. *Fisher* v. *United States*, 425 U.S. 391, 403-405; VIII Wigmore, *Evidence* §2317, p. 619 (McNaughton rev. 1961); *Bouschor* v. *United States*, 316 F. 2d 451, 456-458 (C.A. 8), and cases cited therein; *United States* v. *Goldfarb*, 328 F. 2d 280 (C.A. 6), certiorari denied, 377 U.S. 976; *United States* v. *Threlkeld*, 241 F. Supp. 324 (W.D. Tenn.). Since the purpose of the privilege is to encourage clients to make full disclosure to their attorneys, it protects only those disclosures necessary to obtain legal advice. *Fisher* v. *United States*, *supra*, 425 U.S. at 403; *In re Horowitz*, 482 F. 2d 72, 81 (C.A. 2) (Friendly, J.).

---

[2]The bank turned the records over to the district court prior to the time petitioner obtained from a local court an order temporarily restraining the bank from disclosing the information requested in the summons to the Internal Revenue Service. Pending its decision, the court kept the records under seal (see Pet. App. 51a-54a).

[3]Although the court of appeals noted that it had held in *United States* v. *Friedman*, 532 F. 2d 928, 931 (C.A. 3), that production of summoned records while an appeal was pending from an order directing enforcement of the summons did not render the case moot, two other circuits have dismissed as moot appeals in such cases. See, *e.g.*, *United States* v. *Lyons*, 442 F. 2d 1144 (C.A. 1); *Baldridge* v. *United States*, 406 F. 2d 526 (C.A. 5); *Grathwohl* v. *United States*, 401 F. 2d 166 (C.A. 5). Moreover, unlike this case, the decision in *Friedman* turned in part on the fact that there had been incomplete compliance with the order enforcing the summons (see 532 F. 2d at 931).

It is well established that, absent unusual circumstances, the attorney-client privilege does not protect disclosure of the identity of a client, the conditions of employment, the amount of a fee and who paid it. See, *e.g.*, *United States* v. *Cromer*, 483 F. 2d 99 (C.A. 9); *In re Semel*, 411 F. 2d 195, 197 (C.A. 3), certiorari denied, 396 U.S. 905; *Colton* v. *United States*, 306 F. 2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951 (see Pet. App. 4a n. 4). But the correctness of the decision below need not rest on this settled proposition because the bank records in this case do not constitute confidential information between petitioner and his client. As the court of appeals observed (Pet. App. 3a-4a), this case is on all fours with *Schulze* v. *Rayunec*, 350 F. 2d 666 (C.A. 7). There, as here, an attorney delivered a cashier's check on behalf of a client to the Internal Revenue Service and sought to invoke the attorney-client privilege to bar the enforcement of a summons to the bank to disclose the identity of the purchaser. The court rejected the claim, stating that the bank "* * * was not hired or employed to render any confidential service * * * [and that] [t]he communication, if any, of the client's name was not made in order to enable the bank to aid * * *[the attorney] in giving any legal advice" (350 F. 2d at 668).[4] Accord: *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969; *Harris* v. *United States*, 413 F. 2d 316, 319-320 (C.A. 9); *Securities and Exchange Commission* v. *First Security Bank of Utah*, 447 F. 2d 166, 167 (C.A. 10), certiorari denied, 404 U.S. 1038.

Nothing in *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9); *Tillotson* v. *Boughner*, 350 F. 2d 663 (C.A. 7); or *In re Grand*

[4]While petitioner (Pet. 13) attempts to distinguish *Schulze* on the ground that the attorney in that case merely transmitted the funds and did not perform legal services, nothing in the opinion supports his assertion.

Jury Proceedings, 517 F. 2d 666 (C.A. 5), upon which petitioner relies (Pet. 8, 12), is to the contrary. Those cases involved attempts to require an attorney to disclose the identity of a client upon whose behalf the attorney had made payments. Here, however, the summons was directed to a third party bank and not to the attorney. There is no legitimate expectation of privacy in information voluntarily communicated to a bank. Thus, the bank records sought by the summons are not private papers subject to any claim of privilege, constitutional or otherwise. *United States* v. *Miller*, 425 U.S. 435, 440-441; *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 48-49. See also *Couch* v. *United States*, 409 U.S. 322, 335-336. Indeed, the Court has specifically upheld the use of an Internal Revenue summons to compel a bank to disclose a depositor's identity. *United States* v. *Bisceglia*, 420 U.S. 141.[5]

Petitioner further argues (Pet. 13-14) that he did not voluntarily convey the information to the bank because New Jersey Supreme Court Rule 1:21-6 (Pet. App. 48a-50a) requires an attorney to maintain a trustee account. While the Rule provides that all attorneys are to maintain trustee accounts into which all funds entrusted to their care shall be deposited, it did not require that petitioner deposit the two cashier's checks in question into his trustee's account. Cf. *Johnson* v. *United States*, 228 U.S. 457 (discussed in *Couch* v. *United States*, *supra*, 409 U.S. at 332 n. 14). Indeed, petitioner has failed to show any reason why these two cashier's checks, which totalled the exact amount

[5]In *United States* v. *Tratner*, 511 F. 2d 248 (C.A. 7), upon which petitioner relies (Pet. 8, 15-16), the court ordered a hearing to determine whether certain information in the hands of an attorney qualified under the attorney-client privilege. Here, however, the court of appeals correctly ruled that the attorney-client privilege does not apply to a bank's records of an attorney's trust account.

transmitted to the Service in payment of the tax liability of the undisclosed taxpayer, could not have been transmitted directly to the Internal Revenue Service rather than deposited in the trustee account. The circumstances strongly suggest that he deposited the checks in the account solely for the purpose of preventing the Service from discovering the identity of the taxpayer.[6]

2. Finally, petitioner argues (Pet. 17) that the Bank Secrecy Act of 1970 (84 Stat. 1114, 12 U.S.C. 1829b), upon which the court of appeals relied (Pet. App. 10a), was never intended to diminish the attorney-client privilege. But the Act requires that all federally insured banks maintain certain records specifically because such records are useful in "criminal, tax, and other regulatory investigations." There is no exception for trustee accounts of attorneys and there is nothing in the legislative history to support the existence of such an exception. The court of appeals therefore properly relied upon the Bank Secrecy Act as evidence of a strong congressional interest in making such records available to law enforcement authorities. For reasons previously stated,

---

[6]Petitioner also argues that there is a legitimate expectation of confidentiality as to information conveyed to a bank in regard to an attorney's trustee account because New Jersey Supreme Court Rule 1:21-6(f) states that when any of the records required to be kept by the rule are produced in response to a direction of the Ethics Committee or the New Jersey Supreme Court, "all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege." But nothing in the rule suggests that it encompasses records maintained by a bank (see New Jersey Supreme Court Rule 1:21-6(b); Pet. App. 48a-49a).

At all events, the court of appeals correctly rejected petitioner's argument, renewed here (Pet. 14-15), that the question of privilege is controlled by state law (Pet. App. 7a-9a). See Rule 501, Federal Rules of Evidence, which provides that federal law determines the nature and extent of the privilege of a witness.

however, the attorney-client privilege is not thereby diminished since it is inapplicable to such records in any event.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

---

[7]Petitioner also claims (Pet. 8, 17-20) that the summons was issued for an improper purpose and that enforcement was an abuse of the court's process. But the court of appeals correctly rejected this argument, stating that (Pet. App. 11a, n. 9) "[t]he record reveals that Special Agent Reichelt was assigned to determine the identity of the anonymous taxpayer alone. R. 134a, 140a. There is no basis whatsoever for a finding of "abuse of process."